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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS LYNN TORRES II,

Plaintiff and Respondent,

v.

SA RECYCLING LLC,

Defendant and Appellant.

F075375

(Super. Ct. No. 16CECG03061)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Littler Mendelson, Matthew E. Farmer and Irene V. Fitzgerald for Defendant and Appellant.

George J. Vasquez and George J. Vasquez for Plaintiff and Respondent.

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A former employee sued his employer for retaliatory discharge and failing to timely provide requested payroll and personnel records. In addition to common law causes of action, the employee alleged violations of the Labor Code and requested civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA; Labor Code, § 2698 et seq.).[1] The employer filed a petition to compel arbitration, arguing the claims under PAGA were defective and the remaining claims were subject to the parties' agreement to arbitrate. The trial court determined the PAGA claims were not defective. The court concluded the employee's prelitigation notice properly exhausted PAGA's administrative procedures because the statute did not require the notice to describe other employees affected by the Labor Code violations. The court also concluded the complaint, which stated it was brought on behalf of other employees similarly situated, adequately pleaded a claim for civil penalties under PAGA. Based on the existence of valid PAGA claims, the court denied the petition to compel arbitration.

On appeal, the employer contends a prelitigation notice does not satisfy the requirements of PAGA unless, at a minimum, it states other aggrieved employees potentially exist. In contrast, the employee urges this court to interpret PAGA to authorize a single-claimant lawsuit in which the aggrieved employee seeks to recover PAGA civil penalties for Labor Code violations that affected only the aggrieved employee. Under this interpretation, the prelitigation notice would not need to identify or mention other aggrieved employees.

First, we conclude a civil action under PAGA must be brought by the aggrieved employee on behalf of himself or herself *and* other current or former employees. (§ 2699, subd. (a).) Therefore, a civil action under PAGA must include at least one claim for a PAGA civil penalty based on a Labor Code violation affecting one or more other

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[1] All unlabeled statutory references are to the version of the Labor Code in effect prior to July 1, 2016.

current or former employees. We reject the employee's statutory interpretation because it would result in the remedies available under PAGA, which include civil penalties and attorney fees, being extended to simple Labor Code violations that affect only one employee. The statutory text does not support such a far-reaching application of PAGA.

Second, the question about the contents of the prelitigation notice mailed by the aggrieved employee to the employer and the Labor and Workforce Development Agency (LWDA) involves the interpretation of statutory language requiring the written notice to include "the facts and theories to support the alleged violation" of the Labor Code. (§ 2699.3, subd. (a)(1).) This statutory language is ambiguous as to what "facts," if any, the notice must state about other employees affected by a Labor Code violation. Balancing the various purposes underlying PAGA, we conclude the prelitigation notice must include, at a minimum, a nonfrivolous allegation that other aggrieved employees potentially exist. (See *Williams v. Superior Court* (2017) 3 Cal.5th 531, 545 (*Williams*) [allegations in prelitigation notice must satisfy "the requirements of nonfrivolousness generally applicable to any civil filing," citing Code Civ. Proc., § 128.7].)

Here, the aggrieved employee's prelitigation notice did not state other aggrieved employees potentially existed. His notice described a retaliatory discharge claim and a failure to provide payroll records he requested—claims that involved only his discharge from employment and only his payroll records. Consequently, his prelitigation notice did not satisfy the requirements of section 2699.3 and plaintiff may not pursue claims for civil penalties under PAGA as a representative of LWDA. As the employee's remaining non-PAGA claims are subject to the parties' arbitration agreement, the petition to compel arbitration should have been granted.

We therefore reverse the order denying the petition.

FACTS

Defendant SA Recycling LLC (Employer) is a Delaware limited liability company that does business in California. On June 24, 2015, Employer hired plaintiff Thomas

Lynn Torres II. On that date, Torres and a representative of Employer signed a preprinted one-page "Mutual Agreement to Arbitrate Claims," which stated:

> "If any legally actionable dispute arises which cannot be resolved by mutual discussion between [Employer] and me, the undersigned employee, we each agree to resolve that dispute by binding arbitration before an arbitrator experienced in employment law. The arbitration will be conducted in accordance with the rules applicable to employment disputes of the American Arbitration Association or such other arbitration service as we agree upon, and the laws of the state in which I am (or was last) employed by [Employer]. . . . We agree that this agreement includes any disputes . . . that I may have against [Employer] and/or its related entities and/or employees, arising out of or relating to the employment relationship or termination of employment . . . ."

The provision about how arbitration would be conducted did not incorporate any federal rule or statute. Nowhere did the agreement mention the Federal Arbitration Act (9 U.S.C. § 1 et seq.).

On December 9, 2015, Torres alleges he was performing his regular duties when an argument ensued between him and his supervisor. During the argument, the supervisor became so upset he lunged at Torres with a screwdriver in an attempt to stab him. Several other employees stopped the supervisor by holding him back. That same day, Torres reported the assault to Dave Garmon, the general manager. On December 12, 2015, Garmon suspended Torres, stating:

> " 'On December 09, 2015 you engaged in an altercation with your supervisor. Rather than report this to me, you confronted the Supervisor again and esculated [*sic*] the altercation. This, as it was described by wirnesses [*sic*], nearly lead to a physical altercation."

Six days later and without further contact with Torres, Employer terminated his employment. Torres alleges that his reporting the assault, which violated Penal Code section 245, was a substantial motivating factor in Employer's decision to terminate his employment.

On December 28, 2015, Torres submitted a demand to Employer for his payroll records and personnel file. Employer failed to provide copies of the records within the time limits set by the Labor Code.

In a March 8, 2016 letter to Employer and LWDA, Torres provided notice of violations of section 1102.5, subdivision (b) (retaliation against an employee who internally reports a violation of law) and section 226 (failure to provide payroll records). The contents of the letter are set forth in part II.D.1, *post*.

PROCEEDINGS

In September 2016, Torres filed his first amended complaint, which is the operative pleading for purposes of this appeal. On November 15, 2016, Employer filed its answer, which alleged as affirmative defenses that Torres failed to exhaust administrative remedies and the court lacked jurisdiction because Torres had executed a binding arbitration agreement.

On January 24, 2017, Employer filed a petition to compel arbitration and stay proceedings. Employer's notice of petition stated it was "made pursuant to Code of Civil Procedure sections 1281 and 1281.2, on the grounds that the parties have agreed to arbitrate employment related disputes and this case consists solely of employment related disputes." Employer's memorandum of points and authorities in support of its petition also referred to provisions of the Code of Civil Procedure that are part of the California Arbitration Act (Code Civ. Proc., § 1280 et seq.). Employer's petition and supporting papers did not assert the Federal Arbitration Act applied to the agreement. (See 9 U.S.C. § 2 [contract evidencing a transaction "involving commerce"].)

In March 2017, after Torres filed his opposition and Employer filed its reply, the trial court issued a tentative ruling to deny the petition to compel arbitration in its entirety. After a hearing, the court filed a minute order adopting its tentative ruling as the order of the court. Employer filed a timely appeal.

DISCUSSION

I. Standard of Review

An order denying a petition to compel arbitration is subject to different standards of review depending upon the particular determination under scrutiny. (E.g., *Nieto v. Fresno Beverage Co., Inc.* (2019) 33 Cal.App.5th 274, 279 (*Nieto*); *Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 839.) In other words, the deference called for "varies according to the aspect of a trial court's ruling under review." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.)

First, when the trial court resolves a question of law, its legal conclusion is subject to this court's independent review. (*Nieto, supra*, 33 Cal.App.5th at p. 279.) Second, when the trial court makes a finding of fact and the finding is challenged for lack of evidentiary support, the deferential substantial evidence standard of review applies. (*Ibid*.) Third, when an issue is committed to the trial court's discretion and, based on the applicable legal criteria, the trial court has a range of options from which to choose, the trial court's weighing of the relevant factors and selection of an option will be upheld on appeal so long as the trial court did not exceed the bounds of reason. (See *County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 316.) In this appeal, we independently resolve questions of law involving the interpretation of PAGA. (*Mikkelsen v. Hansen* (2019) 31 Cal.App.5th 170, 178 [interpretation and application of a statute are questions of law subject to de novo review].)

II. Requirements for Pursuing a PAGA Representative Claim

A. Overview of PAGA

1. Statutory Provisions

In September 2003, the Legislature enacted PAGA and it became effective on January 1, 2004. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) The Legislature found and declared that (1) adequate financing of labor law enforcement was necessary to

achieve maximum compliance with state labor laws; (2) in some situations the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties; (3) staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market; and (4) it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, while also ensuring that labor law enforcement agencies' enforcement actions have primacy over private enforcement efforts. (Stats. 2003, ch. 906, § 1.)

The authorization to pursue PAGA civil penalties in a lawsuit is contained in section 2699, subdivision (a), which states "any provision of this code that provides for a civil penalty to be assessed and collected by the [LWDA] . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee *on behalf of himself or herself and other current or former employees* pursuant to the procedures specified in Section 2699.3." (Italics added.) An " 'aggrieved employee' " is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).) The statutory phrase "on behalf of himself or herself and other current or former employees" is relevant to the dispute about the requirements an aggrieved employee must satisfy to be eligible to pursue civil penalties under PAGA.

The Legislature provided two financial incentives for aggrieved employees to pursue the recovery of civil penalties under PAGA. First, when a civil penalty is recovered under PAGA, 75 percent goes to LWDA and the remaining 25 percent goes to the aggrieved employees. (§ 2699, subd. (i).) Second, any employee who prevails in an action is entitled to reasonable attorney fees and costs. (§ 2699, subd. (g)(1).) A third incentive for pursuing civil penalties under PAGA is that such claims cannot be forced into arbitration based on a predispute arbitration agreement. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 386 (*Iskanian*).)

An aggrieved employee's eligibility to recover civil penalties ordinarily assessed and collected by LWDA is conditioned on the exhaustion of the administrative procedures set forth in section 2699.3. The version of section 2699.3 in effect prior to July 1, 2016, contains the procedures applicable in this case. That version provided in relevant part:

> "(a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:
>
> "(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including *the facts and theories* to support the alleged violation.
>
> "(2)(A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699." (Stats. 2015, ch. 445, § 2, italics added.)

The parties' dispute whether Torres properly exhausted "the procedures specified in Section 2699.3" and, thus, whether he has satisfied the conditions for pursuing PAGA civil penalties in a civil action. (§ 2699, subd. (a).) Employer contends that Torres's March 8, 2016 letter to LWDA and Employer was defective, which prevented Torres from properly exhausting the administrative procedures. Employer argues the letter was required to identify or describe other employees affected by a Labor Code violation and failed to do so.[2] Torres disagrees, contending the trial court correctly determined nothing

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[2] Some of the requirements for a proper prelitigation notice are not disputed by the parties. For instance, Torres's letter alleges violations of sections 226 (payroll records) and 1102.5 (retaliation for reporting illegal activity). Both sections are among the

in the language of section 2699.3 requires a claimant to identify other aggrieved employees.

2. Characteristics of a PAGA Representative Claim

Before addressing the specific questions of statutory interpretation presented, we review the principles that establish the representative nature of a PAGA claim. In *Iskanian, supra,* 59 Cal.4th 348, our Supreme Court described some of the legal characteristics of a PAGA representative claim.

An employee who sues to recover the penalties authorized by PAGA does so as the proxy or agent of the state's labor law enforcement agencies, not of other employees. (*Iskanian, supra,* 59 Cal.4th at p. 380.) The employee plaintiff pursues the same legal right and interest as those agencies—specifically, the recovery of civil penalties that LWDA could have assessed and collected if it successfully pursued the Labor Code violations alleged. (*Iskanian, supra,* at p. 380.) The results of the litigation of a PAGA claim are subject to California's collateral estoppel doctrine, which causes the judgment in the action to bind the employee plaintiff, the state labor law enforcement agencies, and any nonparty aggrieved employees who would have been bound by a judgment in an action by the agencies. (*Iskanian,* at pp. 380-381.)

A PAGA representative action is a type of qui tam action because it involves (1) a statute that imposes a penalty, (2) the informer being authorized to sue to recover the penalty, and (3) part of the penalty being paid to the informer. (*Iskanian, supra,* 59 Cal.4th at p. 382.) "The government entity on whose behalf the plaintiff files suit is

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provisions listed in section 2699.5. Therefore, each of Torres's PAGA claims satisfies the prerequisite for "a violation of [a] provision listed in Section 2699.5." (§ 2699.3, subd. (a).) In addition, Torres satisfies PAGA's standing requirement—he has stated he was an employee "against whom one or more of the alleged violations was committed." (§ 2699, subd. (c); see *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 757 (*Huff*) [the plaintiff has PAGA standing if affected by *one* of the alleged violations; the plaintiff need not have personally experienced all the violations pursued in PAGA action].)

always the real party in interest in the suit." (*Ibid*.) The Supreme Court noted only an aggrieved employee may bring a PAGA action, "but that does not change the character of the litigant or the dispute. As Justice Chin correctly observes [in his concurring opinion], '*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state.' " (*Iskanian*, at p. 387.)

To summarize, the Supreme Court views PAGA actions as "representative" because they are brought by an aggrieved employee on behalf of the state, not because the aggrieved employee is standing in the shoes of other employees. (*Iskanian*, *supra*, at p. 380.) Thus, Employer's assertion that a PAGA claim is representative only when brought on behalf of other current and former employees does not conform with our Supreme Court's explanation of why PAGA claims are "representative." From a broader perspective, we conclude the "representative" label attached to PAGA claims does not provide strong support for either side's proposed statutory interpretations.

B. Single-Claimant PAGA Actions

1. Case Law

Torres's argument about single-claimant PAGA actions is related to an assumption made by the Supreme Court in *Iskanian*. The court stated that " '[a]ssuming it is authorized, a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.' " (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) The First Appellate District interpreted this assumption as follows: "Thus, while assuming the possibility of such a claim, the *Iskanian* court did not directly decide whether an 'individual PAGA claim' (i.e., a PAGA claim brought solely on behalf of the plaintiff) is cognizable." (*Tanguilig v.*

Bloomingdale's, Inc. (2016) 5 Cal.App.5th 665, 677 (*Tanguilig*).) The First District did "not decide this question either." (*Ibid.*)

In discussing the circumstances in which a single aggrieved employee is authorized to pursue remedies under PAGA, we will not use the term "individual PAGA claim" or refer to a PAGA claim brought *solely* on behalf of the plaintiff because *Iskanian* states that every PAGA action is a representative action on behalf of the state. Instead, we phrase the legal issue presented in this case and not decided in *Iskanian* or *Tanguilig* as follows: May an aggrieved employee pursue a PAGA claim (i.e., the recovery of civil penalties under PAGA that will be split 75-25 between LWDA and the employee) when the Labor Code violation or violations alleged affected only that employee.[3] As explained below, we interpret PAGA to mean a single plaintiff may not pursue civil penalties under PAGA when the Labor Code violations alleged affected only the plaintiff.

2. Statutory Language and Its Meaning

The relevant statutory text authorizes "a civil action brought by an aggrieved employee on behalf of himself or herself *and* other current or former employees pursuant to the procedures specified in Section 2699.3." (§ 2699, subd. (a), italics added.) In *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, the First Appellate District considered the use of the conjunction "and" in this text and concluded "[a] plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must . . . include ' "other current or former employees." ' " (*Id.* at p. 1123.) The First District supported this interpretation of the statute by citing an unpublished federal

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3 Torres's respondent's brief states this appeal "provides a perfect opportunity for a California appellate court to answer this question." Torres contends (1) he has brought a single-claimant PAGA action that fully complied with the prefiling notice requirements of PAGA and (2) Employer has challenged the validity of the PAGA claims based on the fact they were brought by a single claimant.

district court decision stating the word "and" is unambiguous and connotes conjunction. (*Ibid.*; see *Machado v. M.A.T. & Sons Landscape, Inc.* (E.D.Cal., Jul. 23, 2009, No. 2:09-CV-00459 JAM JFM) 2009 U.S.Dist. Lexis 63414, p. *6.)[4] The federal district court concluded the "statute's language indicates that a PAGA claim must be brought on behalf of other employees." (*Machado,* at p. *6.) More recently, the Sixth Appellate District has adopted this interpretation of section 2699, stating "an employee seeking to recover Labor Code penalties that would otherwise be recoverable only by state authorities . . . must bring the action on behalf of himself or herself *and* others." (*Huff, supra,* 23 Cal.App.5th at p. 756.)

We also conclude the use of the word "and" in section 2699, subdivision (a) is not ambiguous. The statute plainly requires a PAGA action be brought by the aggrieved employee on behalf of himself or herself *and* other current or former employees. As to the meaning of the phrase "on behalf of . . . other current or former employees," we conclude it requires the civil action to include at least one claim for a PAGA civil penalty[5] based on an employer Labor Code violation affecting one or more other current or former employees. Stated another way, the phrase "on behalf of" requires something more than the possibility other employees might benefit in the future because the employer is deterred from similar Labor Code violations. (See Black's Law Dict. (10th ed. 2014) p. 184, col. 1 ["*on behalf of* means 'in the name of, on the part of, as the agent or representative of' "].) A civil penalty in a PAGA action is recovered on behalf of another employee when the penalty is assessed because of a Labor Code violation affecting that employee.

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4 Decisions by the lower federal courts are not binding on matters of state law, but they may be persuasive when their analysis is thorough and well-reasoned. (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175.)

5 A civil penalty under PAGA is one that, if recovered, would be split between LWDA and the aggrieved employee pursuant to section 2699, subdivision (i).

C. Prelitigation Notice

The legal conclusion that an aggrieved employee attempting to recover civil penalties under PAGA must pursue at least one Labor Code violation affecting another current or former employee leads to a question of timing. In broad terms, how soon in the process must an aggrieved employee identify another employee affected by a Labor Code violation? For instance, should that information be included in the aggrieved employee's administrative notice under section 2699.3 or in the complaint that initiates the PAGA action? Alternatively, must the aggrieved employee identify another employee by the close of discovery—a requirement that would allow a defective PAGA claim to be eliminated by a motion for summary adjudication?

Here, we consider the specific issue of what, if any, information about other employees affected by a Labor Code violation must be included in a plaintiff's written notice under section 2699.3. Torres asserts information about other employees is not required in the prelitigation notice. Employer contends the written notice must specifically identify other aggrieved employees. Alternatively, Employer contends the notice, at a minimum, should state other aggrieved employees potentially exist.

1. Statutory Text Lacks a Plain Meaning

Subdivision (a)(1) of section 2699.3 governs the contents of the written notice. It states the aggrieved employee "shall give written notice . . . of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." This statutory language does not mention other aggrieved employees and, therefore, does not *expressly* require the written notice to name or otherwise identify them. Consequently, the question of statutory construction presented is whether the phrase "the facts and theories to support the alleged violation" *impliedly* requires other aggrieved employees to be identified. (§ 2699.3, subd. (a)(1).)

We have reviewed the language used in section 2699.3, subdivision (a) and located no words or phrases that strongly support one interpretation or another of the

phrase "facts and theories." For instance, one might infer from the use of terms that are singular, such as "the alleged violation" and "a violation," that the notice requirements are minimal and identifying other employees is not essential. (§ 2699.3, subd. (a).) However, other reasonable, conflicting inferences can be drawn from PAGA's text. For example, subdivision (a) of section 2699 refers to "a civil action brought by an aggrieved employee on behalf of himself or herself *and* other current or former employees." (Italics added.)[6] This provision reasonably supports the inference that the written notice should describe how the Labor Code violations alleged affected the plaintiff and other employees. As conflicting inferences can be drawn from the text of PAGA, we conclude the text itself is ambiguous and does not resolve whether "the facts and theories" that support "the alleged violation" must identify other employees affected by a Labor Code violation. (§ 2699.3, subd. (a)(1).)

2. Overview of Legislative Purpose

A basic canon of statutory construction states the goal of a court addressing ambiguous language is to "adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) Accordingly, we turn to the legislative purposes underlying PAGA and the administrative procedures contained in section 2699.3.

The Legislature added section 2699.3 to PAGA to "impose[] specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties for Labor Code violations." (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 338.) The administrative procedures in section 2699.3 allow " 'the

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6 Employer contends this language in subdivision (a) of section 2699 plainly requires the written notice to identify other employees. We reject Employer's argument about its plain meaning. Subdivision (a) of section 2699 states conditions relating to "a civil action" and does not *directly* address the contents of the written notice an employee must send to LWDA and the employer.

Labor Agency to act first on more "serious" violations such as wage and hour violations and give employers an opportunity to cure less serious violations. The bill protects businesses from shakedown lawsuits, yet ensures that labor laws protecting California's working men and women are enforced—either through the Labor Agency or through the courts.' (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 1809 (2003-2004 Reg. Sess.) as amended July 27, 2004, pp. 5-6.)" (*Dunlap*, at pp. 338-339.)

This description shows the Legislature balanced various interests in adopting section 2699.3. Those interests include (1) the interest of state labor law enforcement agencies in their enforcement actions having primacy over private enforcement efforts (Stats. 2003, ch. 906, § 1(d)); (2) the interest of employers in avoiding shakedown lawsuits; and (3) the interests of employees in particular and society in general in having the labor laws enforced. Sometimes the interests align. All players would benefit when the process results in the employer curing the violation without the need for litigation, as the resources of the parties and society would not be expended on litigation. (See § 2699.3, subd. (c)(2)(A) ["employer may cure the alleged violation within 33 calendar days of the postmark date of the notice"]; see also § 2699, subd. (d) [definition of "cure"].)

In *Williams*, which was issued about four months after the trial court's ruling, our Supreme Court addressed the written notice requirement and its purposes.

> "Nothing in . . . section 2699.3, subdivision (a)(1)(A), indicates the 'facts and theories' provided in support of 'alleged' violations must satisfy a particular threshold of weightiness, beyond the requirements of nonfrivolousness generally applicable to any civil filing. (See Code Civ. Proc., § 128.7.) The evident purpose of the notice requirement is to afford the relevant state agency, the [LWDA], the opportunity to decide whether to allocate scarce resources to an investigation, a decision better made with knowledge of the allegations an aggrieved employee is making and any basis for those allegations. Notice to the employer serves the purpose of allowing the employer to submit a response to the agency (see Lab. Code, § 2699.3, subd. (a)(1)(B)), again thereby promoting an informed agency decision as to whether to allocate resources toward an investigation.

> Neither purpose depends on requiring employees to submit only allegations that can already be backed by some particular quantum of admissible proof." (*Williams, supra,* 3 Cal.5th at pp. 545-546.)

More generally, the Supreme Court summarized the legislative purpose of PAGA, stating it "was intended to advance the state's public policy of affording employees workplaces free of Labor Code violations, notwithstanding the inability of state agencies to monitor every employer or industry" and "to remediate present violations and deter future ones." (*Williams, supra*, 3 Cal.5th at p. 546.)

3. Purposes Served and Hindered by Identifying Other Employees

Interpreting the phrase "facts and theories" to mean the written notice must provide information about other employees affected by a Labor Code violation would promote some purposes of section 2699.3 while hindering others. Based on the theory that more information leads to better decisionmaking, providing identifying information about other aggrieved employees would be useful to LWDA's investigation of the allegations, its assessment of the seriousness of the Labor Code violation alleged, and its decision whether or not to pursue an enforcement action. The information also would assist the employer in providing a response to LWDA and might aid the employer in determining whether to attempt a cure—that is, "whether to fold or fight." (*Alcantar v. Hobart Service* (9th Cir. 2015) 800 F.3d 1047, 1057; see *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 837-838.)

In contrast, requiring the written notice to include information about other aggrieved employees would act as a barrier to some claims properly brought by an aggrieved employee under PAGA. The written notice is the first step in the administrative procedures specified in section 2699.3 and, at this early stage of the process, an aggrieved employee might not be aware of facts establishing or suggesting another employee was affected by a Labor Code violation. This barrier would decrease the number of notices given, which would have a variety of consequences. First, fewer notices would reduce the information available to LWDA, one of the purposes discussed

in *Williams*, *supra*, 3 Cal.5th at pages 545 through 546. Second, a reduction in the use of the notice procedure also would reduce the opportunities for a cure by the employer before litigation starts. Third, a reduction in the number of employees able to comply with the notice requirement would reduce the number of Labor Code violations subject to private enforcement under PAGA, which would lessen deterrence. For instance, where a Labor Code violation is based on an employer practice or policy that is not disclosed to employees, it would be more difficult for the aggrieved employee to know or reasonably infer other employees suffered similar violations. Thus, requiring information about other employees could undermine an important purpose of PAGA—that is, "affording employees workplaces free of Labor Code violations, notwithstanding the inability of state agencies to monitor every employer or industry" and "to remediate present violations and deter future ones." (*Williams*, *supra*, 3 Cal.5th at p. 546; see *Huff*, *supra*, 23 Cal.App.5th at p. 756 [goal of achieving maximum compliance with state labor laws].) However, the reduction in notices would reduce the resources LWDA and employers expend on cases that ultimately would not qualify for relief under PAGA because the Labor Code violation or violations affected only one employee. In sum, requiring more information to be included in the written notice would weed out some cases that should be eliminated and also might prevent the pursuit of cases in which civil penalties under PAGA are warranted.

The foregoing demonstrates that the purposes underlying PAGA do not unanimously point to a single answer to the question about how much information the written notice provided under section 2699.3, subdivision (a)(1) should contain about other aggrieved employees.

4. Employer's Proposed Standard

Balancing PAGA's various purposes is less difficult when done with reference to a specific proposal about the amount of information the written notice should contain.

Here, one of the least onerous standards suggested by Employer would require the written notice to assert "that other aggrieved employees could potentially exist."

The impact of adopting this proposal is determined in part by the degree of information and belief an employee must have to support allegations included in the written notice. In *Williams*, the Supreme Court concluded the allegations stated in an administrative notice are subject to the requirements of nonfrivolousness generally applicable allegations set forth in a pleading filed in court. (*Williams*, *supra*, 3 Cal.5th at p. 545; see Code Civ. Proc., § 128.7.) Requiring an aggrieved party to include a nonfrivolous allegation that other aggrieved employees potentially exist is a relatively lenient requirement and is not likely to eliminate many claims that, under a more lenient standard, ultimately would have resulted in the recovery of civil penalties under PAGA. In contrast, the requirement would reduce the number of lawsuits by eliminating cases in which the plaintiff lacks information or belief sufficient to allege other aggrieved employees potentially exist but hopes to find a Labor Code violation affecting another employee during the discovery process. Lawsuits of this type might be classified as fishing expeditions and, on balance, the purposes of PAGA would not be served by encouraging them.

Imposing a relatively low hurdle at the beginning of the administrative process would not eliminate PAGA claims by an aggrieved employee who reasonably believes the employer's conduct that violated his or her rights under the Labor Code was taken pursuant to an employer policy or practice that may have affected other employees but lacks the personal knowledge to definitively state other violations occurred and identify the employees affected. For instance, an aggrieved employee might not know of another employee who was denied payroll records after a request, but might have information that provides reasonable support for the inference that such denials are routine or at least occur occasionally. In that situation, the aggrieved employee's administrative notice could include a nonfrivolous allegation stating other affected employees potentially exist.

We therefore conclude the phrase "fact and theories" is reasonably interpreted to require, at a minimum, the administrative notice given under section 2699.3 to include a nonfrivolous allegation that other aggrieved employees potentially exist.

D. Application of Statutory Requirement

1. Torres's Administrative Notice

Torres's March 8, 2016 notice letter to LWDA and Employer was attached to the first amended complaint as an exhibit. It began by stating that "[p]ursuant to Labor Code section 2699.3 you are hereby notified of the following violations of the Labor Code" and listing sections 1102.5, subdivision (b) and 226. Those provisions address retaliation for reporting violations of law and a failure to provide a copy of payroll records within 21 days of an employee's request, respectively. The "**Facts**" section supporting the retaliation claim states:

> "On December 9, 2015, Mr. Torres was assaulted at work by his supervisor who attempted to stab Mr. Torres with a screwdriver, but was stopped by other employees. Mr. Torres reported this information to Dave Garmon the general manager shortly after on December 9, 2015. On December 12, 2015, Dave Garmon suspended Mr. Torres from work pending investigation and eventually terminated Mr. Torres on December 18, 2015 for purportedly violating SA Recycling Code of Conduct.
>
> "Mr. Torres was the victim of a criminal assault with a deadly weapon as defined by Penal Code section 245."

The "**Facts**" section supporting the violation of section 226 states in full: "On December 28, 2015, a demand was submitted to employer. Employer failed to provide copies of employee's personnel file within 21 days."

Torres's first amended complaint alleges LWDA took no action on the notice letter within 33 days of its mailing and Employer took no action in response to the notice. Thus, Torres contends he exhausted the applicable administrative procedures.

2. Application of Statutory Requirement

Here, Torres's March 8, 2016 notice letter did not allege that other aggrieved employees potentially existed, did not state a PAGA claim would be brought on behalf of other aggrieved employees, and did not make any reference to other aggrieved employees. Therefore, we conclude the notice did not satisfy the requirements of section 2699.3, subdivision (a)(1) and, as a result, did not properly exhaust the available administrative remedies.

This conclusion is consistent with *Khan v. Dunn-Edwards Corp.* (2018) 19 Cal.App.5th 804—a decision filed almost 10 months after the trial court's decision in this case. In *Khan*, the Second Appellate District concluded the aggrieved employee's administrative notice was inadequate and upheld the trial court's grant of summary judgment on the PAGA claim. (*Khan,* at pp. 809-810.) Khan's notice referred to " 'my claims against my former employer' " and he admitted the notice made no mention of other Labor Code violations and did not refer to any other employee besides himself. (*Khan,* at p. 807, italics omitted.) The Second District distinguished two federal district court decisions on the ground the notice in those cases "sufficiently suggested claims on behalf of multiple employees" while Khan's notice affirmatively suggested only violations affecting him individually. (*Id*. at p. 810.)

III. Arbitration of Non-PAGA Claims

The rule that employee claims for civil penalties under PAGA cannot be forced into arbitration because the real party in interest, LWDA, was not a party to the arbitration agreement has no application in this case because of our conclusion that Torres's defective administrative notice precludes him from pursuing claims for civil penalties under PAGA. (See *Iskanian, supra,* 59 Cal.4th at p. 386.) Consequently, the cognizable claims in Torres's complaint seek relief specific to Torres and there are no cognizable claims in which he is acting as the representative of LWDA. Therefore,

Torres's cognizable claims are subject to arbitration in accordance with the terms of the parties' arbitration agreement.

When a lawsuit includes some issues that are not subject to arbitration and some that are, Code of Civil Procedure section 1281.2 sets forth the circumstances in which a trial court may decide to sever some of the claims set forth in a complaint and send them to arbitration. That section does not apply in this case because all the cognizable claims are subject to arbitration. Consequently, the petition to compel arbitration should have been granted.

DISPOSITION

The order denying the petition to compel arbitration is reversed. On remand, the trial court is directed to issue an order granting the petition. Defendant shall recover its costs on appeal.

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DETJEN, J.

WE CONCUR:

_____
HILL, P.J.

_____
LEVY, J.